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IN THE COURT OF APPEALS OF INDIANA

WAYNE T. CRAIGO,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0607-CR-288
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George Biddlecome, Judge
Cause No. 20D03-0502-FB-28

February 23, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Wayne T. Craigo appeals his conviction for sexual misconduct with a minor as a class B felony. We affirm.

Issues

Craigo presents two issues, which we restate as the following three:

I. Whether the trial court committed fundamental error by admitting evidence regarding a sexual encounter between Craigo and the victim that was unrelated to the incident for which he was charged;

II. Whether the trial court abused its discretion by admitting evidence regarding the victim's behavior following the crime; and

III. Whether the trial court abused its discretion by admitting evidence regarding the victim's prior inconsistent statements.

Facts and Procedural History

In February 2005, S.W. was fourteen years old. S.W.'s best friend was Craigo's daughter, K.C., and S.W. spent a lot of time at K.C.'s house. Craigo, who was thirty-one years old, invited K.C., S.W., and K.C.'s friend, Stacy, to a party. K.C. was unable to attend the party because she was spending the night with a friend named Cassandra. However, she told S.W. about the party. S.W. spent time that evening with K.C. at Cassandra's house, and then S.W. left with two friends who had come to pick her up. K.C. did not see S.W. again that night.

Later that same month, S.W. ran away from home for four days.[1] She left a note explaining that she was unhappy. S.W.'s father attempted to locate S.W. by calling her friends. He contacted K.C., and she told him that she did not know S.W.'s whereabouts. One night following her disappearance, S.W. called home, was "belligerent" and "cussing" and refused to reveal her location. Tr. at 225. The next night, she snuck back in the house, and her father found her asleep in her bed the next morning.

S.W.'s father later talked with Miranda Barker about the incident. Barker testified that she hosted a party in late January or early February of 2005. Craigo and S.W. attended the party. Craigo had a bedroom at Barker's apartment, and Barker saw Craigo and S.W. together at the apartment several times during a two-week period following the party. When S.W. stayed overnight at the apartment, she slept in Craigo's bedroom. Barker witnessed Craigo and S.W. "kissing, hugging, sitting together, [and] holding hands." *Id*. at 267. Barker once saw S.W. sleeping naked on a mat next to Craigo in his room. Robert Winnings testified that he saw S.W. drinking alcohol at the apartment. Jason Chupp witnessed S.W. performing fellatio on Craigo in the living room of Barker's apartment.

At trial, Barker testified that she saw Craigo leave his bedroom on one occasion with blood on his shirt "around where his belt buckle would … be." *Id*. at 270. She said that "he was joking around about the blood" and "he said [S.W.] can't hang with this eight and a three-quarter inch cock." *Id*. Winnings testified that he heard Craigo say, in reference to the blood on his shirt, "That bitch thought she could hang." *Id*. at 305.

[1] S.W.'s father testified that S.W. was missing for "four and a half days," but his testimony also indicates that she was discovered missing on Friday morning and was found asleep in her bed on Saturday

On February 25, 2005, the State charged Craigo with sexual misconduct with a minor as a class B felony for the act of fellatio witnessed by Chupp. On March 23, 2006, a jury found Craigo guilty as charged. Craigo now appeals.

Discussion and Decision

I. Evidence Regarding Sexual Encounter

Craigo contends that the trial court erred by admitting Barker's and Winnings's testimony regarding his statements about the blood on his shirt. As the State points out, Craigo failed to object to the admission of this testimony, and thus he has waived review of this issue. Craigo argues, however, that the trial court's decision to admit the evidence rises to the level of fundamental error. As our supreme court recently noted, however, the fundamental error exception is "extremely narrow[.]" *Mathews v. State*, 849 N.E.2d 578, 587 (Ind. 2006). It applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process. *Id.*

The parties disagree about whether the evidence at issue was admissible under Indiana Evidence Rules 401, 403, and/or 404(b). We need not address these arguments, however, because we conclude that even if the testimony was inadmissible, any error was harmless and thus did not rise to the level of fundamental error.

While the evidence at issue certainly supported the State's theory that Craigo and S.W.'s relationship was sexual in nature, it did not prove any element of the State's specific charge against Craigo, which involved one act of fellatio. However, the State did present

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morning. Tr. at 222-29.

direct evidence to support Craigo's conviction by way of Chupp's eyewitness testimony regarding S.W. performing fellatio on Craigo. Tr. at 267. Therefore, any error in the admission of Craigo's comments about the blood was harmless.

II. Admission of Evidence Regarding Changes in S.W.'s Behavior

Craigo argues that the testimony of S.W.'s father regarding the changes in S.W.'s behavior following her time with Craigo was improperly admitted because it was unfairly prejudicial. "[Relevant] evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." Ind. Evidence Rule 403. The proper inquiry is not whether evidence is prejudicial; rather it is whether the evidence is unfairly prejudicial since all relevant evidence is inherently prejudicial. *Cadiz v. State*, 683 N.E.2d 597, 600 (Ind. Ct. App. 1997).

A decision regarding prejudice is within the sound discretion of the trial court, and we afford a great deal of deference to such a decision on appeal. *Sandifur v. State*, 815 N.E.2d 1042, 1048 (Ind. Ct. App. 2004), *trans. denied*. We will reverse only upon a showing that the trial court manifestly abused its discretion and the defendant was denied a fair trial. *Id*. An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court. *Ables v. State*, 848 N.E.2d 293, 296 (Ind. Ct. App. 2006).

Here, S.W.'s father testified that he noticed a difference in her behavior after she returned home in February 2005. Specifically, he stated, "[S]he wasn't acting like a fourteen year old anymore. It was like she thought she was eighteen or an adult, you know. It just

wasn't the same fairly innocent [S.W.] that I knew." Tr. at 234. Craigo asserts that these statements had little probative value but were highly prejudicial because they implied that Craigo had "deprived S.W. of her innocence—one more item for the jury to hold against [Craigo] and one more reason to convict." Appellant's Br. at 11-12.

S.W.'s father's testimony was relevant in describing his daughter's adult-like behavior following her time with Craigo, which supported the State's claim that he had engaged in sexual misconduct with her. While this evidence may have been prejudicial to Craigo's defense, we cannot conclude that it was unfairly prejudicial of that the trial court manifestly abused its discretion by admitting it.

III. Admission of Evidence Regarding Prior Inconsistent Statement

Craigo contends that the trial court abused its discretion in allowing Child and Parent Services employee Barbara Vernon to testify regarding statements S.W. made to her during a forensic interview conducted shortly after S.W. returned home. The State claims that the trial court properly admitted Vernon's testimony under Indiana Evidence Rule 613(b), which states in pertinent part as follows:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

At trial, S.W. testified that when she ran away from home, she stayed with her friends "Mike and Sally, and their two little kids, Casey and Joe-Joe," who lived at Farmington Hills

Apartments.[2] Vernon later testified that when she interviewed S.W. shortly after her return, S.W. stated that she had been staying "at a house somewhere." Tr. at 369. Vernon also testified that S.W. never mentioned Farmington Hills but rather stated that she did not know the location of the house in which she had stayed because "it was dark and she didn't know where they had gone." *Id*. at 370. S.W. mentioned that she had seen someone named Sally during the time she was away from home but that she did not mention anyone named Mike.

Craigo contends that the statements S.W. made to Vernon cannot be classified as "prior inconsistent statements" because they did not contradict S.W.'s testimony. We disagree. S.W.'s testimony was that she stayed in Farmington Hills, an apartment complex, with Mike and Sally and their children. S.W. told Vernon shortly after she returned home that she had been staying at a house in an unknown location, and she did not identify the house as Sally's, nor did she make mention of Mike. After reviewing the statements, we cannot conclude that the trial court abused its discretion in finding S.W.'s prior statements to Vernon inconsistent with her testimony.[3]

Affirmed.

SULLIVAN, J., and SHARPNACK, J., concur.

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[2] It appears that Farmington Hills is an apartment complex in Elkhart, although S.W. did not identify it as such during her testimony.

[3] Specifically, the trial court found that S.W.'s statements to Vernon were inconsistent with her testimony, that S.W. was given an opportunity to explain the statements, and that opposing counsel was given an opportunity to cross-examine her on the issue. Craigo argued that the statements were not inconsistent but did not dispute the court's other conclusions on this issue. As Craigo points out, S.W. testified that she talked with someone at Child and Protective Services, but she did not remember the interviewer's name. After her testimony (and before Vernon's testimony), S.W. was released from her subpoena with Craigo's consent. When this Rule 613(b) issue was raised, the trial court requested that the State attempt to locate S.W. so that she would be available to reappear if Craigo so desired. Craigo rested, however, without recalling S.W.